No. 87-1920

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PAUL CHOLODENKO,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

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QUESTIONS PRESENTED

1. When an individual enters a private residence during the execution of a search warrant directed at its occupants and narcotic trafficking on the premises, must law enforcement officials establish a nexus between that individual and the alleged criminal activity before they may detain him and conduct a pat-down search for weapons? This question raises concerns left undecided by this Court's decisions in *Ybarra v. Illinois*, 444 U.S. 85 (1979) and *Michigan v. Summers*, 452 U.S. 692 (1981).

2. Did the California Court of Appeal misapply established Fourth Amendment principles in accepting the trial court's determination that petitioner was not detained, because although the sheriff's deputy took possession of his keys, wallet and money, petitioner never asked or attempted to leave?

3. Did petitioner voluntarily consent for Fourth Amendment purposes to the search of an automobile whose very existence he vehemently denied when he gave the sheriff's deputy permission to search "whatever you want with those keys" found in his possession, although unbeknownst to petitioner the officer had ascertained the car's presence outside?

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The petitioner Paul Cholodenko respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Two, rendered on December 7, 1987, following denial of his petition for review by the California Supreme Court on March 24, 1988. This case presents important questions of law under the Fourth Amendment to the United States Constitution concerning the constitutional authority to conduct a search for weapons and detain an individual not named in a search warrant for a private residence, who is a non-occupant but enters the premises during its execution, and whether his subsequent consent to the search of an automobile parked outside was rendered lawful by the individual's denial of such vehicle's existence at a time when its presence was known to the searching officers and his

keys and other personal possessions had been seized by them.

PARTIES TO THE PROCEEDING

Petitioner is Paul Cholodenko, defendant before the Superior Court for the State of California in and for Los Angeles County and appellant below. Respondent is the People of the State of California, plaintiff and respondent below, represented by the Attorney General of California. There are no other parties to this proceeding.

OPINION BELOW

The opinion of the Court of Appeal for the State of California, Second Appellate District, Division Two, is unreported and is reproduced as Appendix A to this petition. The order of the California Supreme Court denying review is also unreported and is attached as Appendix B.

JURISDICTION

The judgment of the California Court of Appeal was filed on December 7, 1987. The order of the California Supreme Court denying review was filed on March 24, 1988. Under California law, the judgment of the Court of Appeal became final upon the Supreme Court's denial of review. Cal. Rules of Court, R. 24, 25, 28. This petition is timely filed within 60 days of March 24, 1988. The jurisdiction of this court is invoked pursuant to Title 28, United States Code section 1257, subdivision (3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part: "The right of the

people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

STATEMENT OF THE CASE

Petitioner Paul Cholodenko was charged by information filed in the Superior Court of the State of California for the County of the Los Angeles (Case No. A756045) with one count of transportation of a controlled substance in violation of California Health & Safety Code §11352 (count 5), and one count of possession of a controlled substance for sale in violation of California Health & Safety Code §11351 (count 6). It was further alleged, as to each count, that he possessed more than 28.5 grams of cocaine within the meaning of California Penal Code §1203.04 (b)(1). CT 190-195. Three other codefendants were named in the information and charged in various counts; however, petitioner's case was tried separately. CT 190-195, 230.

Petitioner initially pled not guilty. CT 224. After his motion to suppress the evidence against him, brought pursuant to California Penal Code §1538.5, was denied in the Superior Court, he changed his plea to guilty as to count six and admitted the Penal Code §1203.04 (b)(1) allegation causing him to be ineligible for probation. CT 224, 245-251. Count five was dismissed. The court sentenced him to a term of two years in the state prison. Finding a legal basis for appealing the denial of his suppression motion, the court permitted petitioner's release on bail of $10,000 pending appeal. CT 249, 251.

Petitioner's judgment of conviction was affirmed by the California Court of Appeal, Second Appellate District, Division Two, in an unpublished opinion filed on December 7, 1987. Appendix A. On March 24, 1988, the California Supreme Court denied his petition for review. Appendix B.

The facts surrounding the search and detention of petitioner and the subsequent search of his automobile are fairly simple although not without some dispute. On August 6, 1985, Los Angeles County sheriff's deputies armed with a search warrant for various apartments in a building located at 11910 Mayfield Avenue, began investigating suspected drug dealings at that location. A-2, RT 29. Earlier that day, Deputy Gordon and other officers had seized two kilos of cocaine and arrested two individuals after effecting a traffic stop. Those two individuals, whom he knew to be residents of the apartment complex at the Mayfield location, were detained in a car parked near the apartment building under the supervision of Deputy Cortez. A-2, RT 37.

Deputy Gordon knocked on the door of apartment 101; when Karolin Alexander opened the door, Gordon announced that he was there to execute a search warrant. The officers entered and Alexander and a second female occupant were kept under watch while the search ensued. At the suppression hearing, Gordon could not remember if he found a "small amount of cocaine" (1/4 gram) in one of the bedrooms before or after petitioner's subsequent arrival at the apartment; his report indicated it was prior. A-2, RT 50, 52, 57k.

As Deputy Gordon was leaving the bedroom, petitioner walked into the apartment. A-2. Gordon did not hear him knock. RT 34. However, Karolin Alexander testified that petitioner knocked at the door and was admitted by the police. RT 76. Gordon stopped petitioner and identified himself as a deputy sheriff conducting a narcotics investigation. Petitioner explained that he was there to visit his girlfriend. A-2.

Deputy Gordon began a pat down search of petitioner. He reacted indignantly, "You don't have to do all that. Here. Look," RT 39, and emptied his pockets onto a small table. The contents of petitioner's pockets consisted

of his wallet, a set of keys, and almost two thousand dollars in small bills. A-3.

Gordon offered the following justification for conducting the pat down search:

> " 'Well, he didn't knock. He didn't appear to be a visitor. He — appeared to have some sort of business there. He was interested in what I was doing. He was demanding to now [sic] why I was there. And he appeared to me to be just a little more than just a concerned citizen. And it was my feeling that he had some involvement or business there . . . He decided to come in and be in the middle of it. He's being pushy. He leads me to believe that he had some dominion there. He's paying the rent.' " A-2.[1]

Perhaps the real motivation behind Gordon's desire to frisk petitioner was the deputy's candid admission that " '. . . I patdown *everyone* I come in contact in a house when I have a search warrant for my own safety.' " A-3; emphasis added.

After completing this search, Deputy Gordon was not sure whether or not petitioner was free to go because petitioner never asked to leave. A-3. Gordon read petitioner his constitutional rights and then asked him if he could search his car. Petitioner denied having a car present, claiming he was dropped off by friends. A-4, RT 43. Out of petitioner's presence, Gordon radioed down to Deputy Cortez[2] who was sitting outside the apartment building, and asked him if anyone had recently driven up to the building. Cortez responded that one person had

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[1] The testimony of Karolin Alexander — undisputed by the State — was that petitioner did not live in the apartment and did not pay the rent. See RT 85-86.

[2] The Court of Appeal claimed that Gordon contacted Deputy Taylor by radio. That view appears to be erroneous because Taylor also was in the apartment with Gordon, watching the two female occupants. See RT 57u, 5711, 60.

arrived in an El Camino automobile, describing petitioner. A-4, RT 46, 57kk-57mm. Gordon then replied: " 'We got 'em.' " RT 57qq, Thus, Gordon knew at that time that petitioner was not being truthful. A-4.

Deputy Gordon returned to petitioner and picked up the keys that petitioner had placed on the table. He asked petitioner again if he could search his car and petitioner again denied having a car present. RT 49. Gordon next " 'asked him if he'd — If I could search any car on the street that these keys operated.' " A-4. Petitioner replied: " 'You can search whatever you want with those keys. I don't have a car out there.' " A-4, RT 48.

Deputy Gordon believed he now had petitioner's consent to search the El Camino because, "He didn't say no." A-4, RT 49. Gordon accordingly placed petitioner's wallet, keys and money in his pocket and went outside to search the car. A-4, RT 57ee. Petitioner sat down in the kitchenette area with Deputy Taylor and the two females. Taylor stated that at that time, "I was not going to let anybody leave." RT 65. Gordon and Deputy Newman then retrieved a gun and kilogram of cocaine from the El Camino. A-4, RT 57tt. Petitioner was thereupon arrested. A-4.

As noted above, petitioner's motion to suppress the fruits of the searches of his person in the Mayfield Apartment and of the El Camino automobile, on Fourth Amendment grounds, was denied by the trial court. He subsequently entered a guilty plea and was sentenced, but has been permitted to remain at liberty on bail in order to raise the same issues on appeal.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

THIS CASE PRESENTS A COMPELLING VEHICLE FOR THIS COURT TO RESOLVE THE QUESTION OF WHETHER THE POLICE MUST ESTABLISH A PARTICULARIZED, ARTICULABLE NEXUS BETWEEN A PERSON WHO ARRIVES AT A PRIVATE RESIDENCE DURING THE EXECUTION OF A SEARCH WARRANT AND ALLEGED ONGOING CRIMINALITY, BEYOND MERE PRESENCE AT THE LOCATION, BEFORE A PAT DOWN SEARCH OF SUCH NON-OCCUPANT IS PERMISSIBLE UNDER THE FOURTH AMENDMENT

It is by now a well-settled proposition of Fourth Amendment jurisprudence that some seizures of the person constitute such limited intrusions that they are deemed reasonable, although not supported by probable cause, when justified by substantial law enforcement interests. *Michigan v. Summers*, 452 U.S. 692, 699-700 (1981). In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court set forth the standard by which the reasonableness of a "stop and frisk" is to be tested:

> "Our evaluation of the proper balance that has to be stuck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the

> belief that his safety or that of others was in danger. [Citations omitted.] And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. [Citations omitted.]" *Id.* at 27.

Ybarra v. Illinois, 444 U.S. 85 (1979), extended the *Terry* standard to the pat-down search of patrons of a public tavern. This court held in *Ybarra* that patrons of a *public* tavern could not be subjected to a *Terry* frisk pursuant to a search warrant and state statute allowing for a limited pat-down search, ". . . unless the officers had individualized suspicion that the patron might be armed or dangerous." *Michigan v. Summers, supra*, 452 U.S. at 699 n. 9.

The *Ybarra* decision emphasized that ". . . a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." 444 U.S. at 91. As the Court concluded,

> "Nothing in Terry can be understood to allow a generalized 'cursory search for weapons' or, indeed, any search whatever for anything but weapons. The 'narrow scope' of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Id.* at 93-4.

Subsequently, *Michigan v. Summers, supra*, 452 U.S. at 705, recognized that a search warrant issued on probable cause implicity carried with it the authority to detain the *occupant* of the premises which was the subject of the warrant. In *Summers*, the police *knew* the defendant lived

in the house and did *not* search him until they had probable cause to arrest him, and then did so. *Id.* at 695 n. 4. One justification for detaining the *occupant* of a residence being searched, *Summers* reasoned, "is the interest in minimizing the risk of harm to the officers. Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Id.* at 702.

Of significance to the present case is this observation by Justice Stewart dissenting in *Summers:*

> "As the Court acknowledges, ante, at 702, the record in this case presents no evidence whatsoever that the police feared any threat to their safety or that of others from the conduct of the respondent, or that they could reasonably have so feared. The Court says that this nevertheless was the 'kind of transaction that may give rise to sudden violence . . .' *Ibid.* But where the police cannot demonstrate, on the basis of specific and articulate facts, a reasonable belief that a person threatens physical harm to them or others, the speculation that other persons in that circumstance might pose such a threat cannot justify a search or seizure. *Ybarra v. Illinois,* 444 U.S. 85, 92-3." *Id.* at 709 n. 1 (dis. opn. Stewart, J.).

This Court has yet to address the question of whether the rationale of *Ybarra* applies to the execution of search warrants in *private* residences, although that conclusion seems implicit from the *Ybarra* rationale. Moreover, *Summers* does not resolve the broader question of whether someone not known to be an occupant of a residence may be detained or searched while a search warrant is being executed; again, the random detaining of an individual *not* known to be an occupant of the residence would appear to be clearly at odds with the *Ybarra* holding.

The danger of not requiring the specific, articulable facts necessary to conduct a *Terry*-type pat down for weapons, based on a reasonable concern for officer safety, in the circumstances presented by a search of *non*-occupants of a private home, is that an intrusion would be permitted without Fourth Amendment protection merely on the basis that narcotics are believed to be involved. The jurisdiction found in *Summers* for detaining *occupants* of a private residence — the "easily identifiable and certain" connection with the site, 452 U.S. 703-04 — is far less ascertainable and considerably less compelling when applied to persons *not* shown to be in control of the premises, while the constitutional infringement of individuals not connected to a home for which a search warrant has issued necessarily is far greater.

Accordingly, several state courts and the lower federal courts — in an attempt to reconcile *Summers* with *Ybarra* — have arrived at a "presence plus" or "nexus" analysis to define the role played by the Fourth Amendment in searches of a private residence. These cases require a showing of *more* than mere presence or proximity to a place under investigation for narcotics dealing before a non-occupant may be constitutionally subjected to a pat-down search or seizure.

In *State v. Broadnax*, 98 Wash.2d 289, 654 P.2d 96 (1982) (en banc), the Supreme Court of Washington discussed this problem:

> "The Court of Appeals attempted to distinguish *Ybarra* because it involved a search at a public tavern, whereas this case involves a search at a private residence where narcotics had probably been sold within the preceding 24 hours. [Citation omitted.] As pointed out by dissenting Judge Ringold, the private versus public distinction is fallacious and ignores the real teachings of *Ybarra*. [Citations omitted.] Regardless of the setting, *Ybarra* states that 'constitutional protections [are] possessed

individually'. (Italics ours.) *Ybarra*, 444 U.S. at 92, 100 S.Ct. at 342. Therefore, a reasonable suspicion that a person is armed and dangerous must exist as to each individual to be frisked. Merely associating with a person suspected of criminal activity does not strip away the protections of the fourth amendment to the United States Constitution. Since the officers had no fear that petitioner was armed and had nothing to independently connect petitioner to the suspected illegal activity in the house, the detention and search of his person were not 'reasonable' under the Fourth Amendment or Const. art I, §7." *Id.*, 654 P.2d at 101.

In accord with *Broadnax* is *Lippert v. State*, 664 S.W.2d 712 (Tex.Cr.App. 1984) (en banc). There, officers executing a search warrant confronted the defendant not knowing whether he had entered the premises before or after the search began. Drugs and drug paraphernalia were previously found at the residence. Defendant asked the police, "What's going on?" He was told a drug raid was in progress and to ". . . assume the position — to place his hands on the wall." 664 S.W.2d at 715. Defendant was frisked and nothing was discovered. *Ibid.* Defendant was then detained while the police continued their search. Another officer arrived at the residence to transport the arrestees to the station, and "[a]s a matter of routine procedure," defendant was again searched for weapons. *Id.* at 715. This search turned up a quantity of methamphetamine. *Id.* at 715-16. Citing *Broadnax*, *supra*, and *United States v. Cole*, 628 F.2d 897 (5th Cir. 1980), *United States v. Clay*, 640 F.2d 157 (8th Cir. 1981), and *State v. Peters*, 611 P.2d 178 (Kan.App. 1980), the Texas Court of Criminal Appeals reasoned in *Lippert* that the *Ybarra* rationale extended to non-occupants of a private residence. 664 S.W.2d at 718-19.

Addressing the effect of *Summers* upon their conclusion that *Ybarra* controls the instant situation, the

Washington and Texas courts agreed there is no conflict. As *Lippert*, quoting from *Broadnax*, explained:

> " 'In *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), the Court did permit officers executing a residential search warrant to *detain* the *occupant* of the home while the search was completed. The basis for the limited intrusion was that
>
> > " '[t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.
>
> *Summers*, at 703-04, 101 S.Ct. at 2594. Thus, an occupant's constructive control over the premises which is the subject of a search warrant provides a sufficient connection with the suspected illegal activities to permit a detention of that individual. *A footnote in Summers, however, suggest that while occupants of private residences may be "seized" while a proper search of the premises is conducted, any search of those occupants or others on the premises must meet the standard of Ybarra. Summers*, at 695-96 n. 4, 101 S.Ct. at 2590 n. 4.
>
> " 'When *Summers* is read in conjunction with *Ybarra*, it becomes clear that persons not directly associated with the premises and not named in the warrant cannot be detained or searched without some independent factors tying those persons to the illegal activities being investigated. In other words, "mere presence" is not enough; there must be "presence plus" to justify the detention or search of an individual, other than an occupant, at the scene of a valid execution of a search warrant. See generally Carr, *Michigan v. Summers: Detentions Permitted*

While Search Warrant is Executed, 8 Search & Seizure L.Rep. 115-19 (1981) . . .

• • •

" '*A person's mere presence at the scene of suspected criminal activity does not entitle police officers to search that individual. Neither may the police seize an individual, other than an occupant of the premises so as to make him available in case probable cause is later developed to arrest him.*

• • •

" 'Absent some independent factors tying petitioner to the illegal activities on the premises, it was no more likely he was engaged in the criminal enterprise than that he was an innocent visitor on the premises. See *United States v. Vilhotti, supra* (323 F.Supp. 425 [S.D.N.Y. 1971]). The discovery of contraband during the execution of a search warrant does not alone establish probable cause to arrest all persons present.' (Emphasis supplied.)" *Lippert*, 664 S.W.2d at 720, quoting *State v. Broadnax*, 654 P.2d at 103.

A survey of other decisional law suggests that *Broadnax* and *Lippert* represent the emerging rule that a nexus or "presence plus" must exist before a person not directly associated with the premises or alleged illegal activities under investigation may be searched while a residential search warrant is being executed unless, of course, *other* circumstances recognized as satisfying the standard of reasonableness are shown to be present. See generally *State v. Weber*, 668 P.2d 475 (Or.App. 1983); *People v. Gross*, 465 N.E.2d 119 (III.App. 1984); *State v. Hinkel*, 365 N.W.2d 774 (Minn. 1985); *State v. Carrasco*, 711 P.2d 1231 (Ariz.App. 1985); *State v. Lambert*, 710

P.2d 693 (Kan. 1985); *White v. United States*, 512 A.2d 283 (D.C.App. 1986); *United States v. Clay*, 640 F.2d 157 (8th Cir. 1981); and *United States v. Jones*, 657 F.Supp. 492 (W.D.Pa. 1987); but cf. *State v. Gobley*, 366 N.W.2d 600 (Minn. 1985), cert. denied 474 U.S. 922 (distinguishing *Ybarra* because search warrant not executed in a public place and warrant issued for stolen goods which included guns). As Professor LaFave points out, however, this proposition is not without its detractors:

> "The lower court cases since *Ybarra* do not all point in the same direction. Some of the cases indicate a willingness to allow a frisk provided the person has a somewhat stronger link to the premises than Ybarra did to the bar where he was found. Other cases require considerably more than this." 2 W. LaFave, *Search and Seizure*, §4.9 (d), at 302 (1987); footnotes omitted.

In the present case, the California Court of Appeal has eschewed the analytical approach found in the above line of authority in favor, seemingly, of a bright-line rule which permit the pat-down search of *any* non-occupant who enters the residence during the execution of a search warrant, solely on the basis that the police were involved in a narcotics investigation. The opinion makes passing reference to Deputy Gordon's practice of searching everyone he encounters during the execution of a warrant for his own safety. A-5. The court observes this would be "good news for Cholodenko if Gordon had not had a reasonable suspicion that Cholodenko was armed." A-5. But, in the very next breath, the opinion dismisses that recognition by explaining that

> ". . . the officers had already found illicit drugs in the apartment. Experience teaches that people connected with cocaine are very often armed. Finally, Cholodenko had indicated by his assured entry and purposeful attitude that 'he had some involvement or business there.' If he had business in

that apartment, it could be related to the cocaine; if so, he could be armed. This reasoning, supported by the evidence, amply justified the pat down." A-5.

This conclusion disregards the teaching of *Ybarra and* misapprehends the Court's treatment in *Summers* of the justification for detaining the occupant of a home based on a neutral magistrate's probable-cause determination that "someone in the home is committing a crime." 452 U.S. at 703. Clearly the factors cited by the opinion — in particular, the fact contraband had been found in the apartment — did not, *without more*, provide an adequate basis for departing from the requirement imposed by the great majority of jurisdictions to consider the question, *viz.*, a nexus or "presence plus" that may reasonably establish a connection between a visitor to the premises and ongoing criminal activity at that situs. See *State v. Broadnax, supra*, 654 P.2d at 104; *State v. Lippert, supra*, 664 S.W.2d at 720.

It is worthy of note that Deputy Gordon was not even sure at the time of the suppression hearing whether the small amount of cocaine in one bedroom was found before or after petitioner entered the apartment. RT 50, 52, 57k. Even petitioner's "assured entry and purposeful attitude." A-5, could not transform him into an occupant who could be held constructively in possession of the contraband. Cholodenko's claim that he was visiting a girlfriend easily explains his self-assured and purposeful entry. Indeed, "[a]bsent some independent factors tying petitioner to the illegal activities on the premises, it was no more likely that he was engaging in criminal enterprises than that he was simply an innocent visitor on the premises." *Broadnax, supra*, 654 P.2d at 105.

Finally, the syllogism that *if* petitioner had "business" in the apartment, and *if* that business *could* be related to cocaine, then "he *could* be armed," A-5, seems exactly the kind of speculation rejected by *Terry*. By such faulty logic the California court approves an all-encompassing,

absolute rule which allows the police to search *all* those present for weapons despite the absence of any objectively reasonable belief a non-occupant such as petitioner was armed, dangerous or involved in illicit activity.

The California Court of Appeal therefore failed to correctly apply the precepts of the Fourth Amendment consistent with this Court's prior decisions in *Ybarra* and *Summers*, as established by the emerging majority line of cases exemplified by the *Broadnax* and *Lippert* decisions. The appellate court's decision cannot be reconciled with the careful balancing of legitimate law enforcement purposes against the resulting intrusion on personal liberty that has been the hallmark of the Court's Fourth Amendment jurisprudence, and it ignores the recognition in *Ybarra* that Cholodenko's individually possessed protection under the Fourth Amendment was "separate and distinct," 444 U.S. at 91, from that of the occupants of the Mayfield apartment.

This case presents an appropriate occasion for this Court to authoritatively set forth the constitutional standards attending pat-down searches and seizures of non-occupants of a private residence that is properly the subject of a search warrant, and to clarify whether mere presence alone suffice as the opinion below holds. Petitioner respectfully urges this Court to grant his petition for writ of certiorari and decide this important question.

II

THIS COURT SHOULD CONSIDER WHETHER THE CALIFORNIA COURT OF APPEAL MISAPPLIED FOURTH AMENDMENT PRINCIPLES IN DETERMINING THAT PETITIONER WAS NOT DETAINED ONCE DEPUTY GORDON HAD SEIZED PETITIONER'S KEYS AND PLACED PETITIONER'S WALLET AND MONEY IN HIS POCKET AFTER LEARNING THAT PETITIONER DID IN FACT HAVE A CAR PRESENT AT THE LOCATION BECAUSE THE QUESTION WHETHER HE WAS FREE TO LEAVE "DID NOT ARISE"

Justice Stewart's lead opinion in *United States v. Mendenhall*, 446 U.S. 544 (1980) (Rehnquist, J., concurring), stated: "We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *Id.* at 553. The following now familiar standard was then announced by Justice Stewart: "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554; accord *Wilson v. Superior Court*, 34 Cal.3d 777, 789-790, 195 Cal.Rptr. 671, 670 P.2d 325 (1983) (reading *Florida v. Royer*, 460 U.S. 491 (1983) as signifying that "a substantial majority — and perhaps all" members of the Court now agree with Justice Stewart's standard in *Mendenhall*).

The lead opinion then applied its test to the facts before the Court:

> "On the facts of this case, no 'seizure' of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and

> displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such contact, without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official." *Mendenhall*, 446 U.S. at 555 (opn. of Stewart, J.).

Significantly, *Mendenhall* noted that "[t]he District Court specifically found that the respondent accompanied the agents to the office ' "voluntarily in a spirit of apparent cooperation." ' " *Id.* at 557.

In *Florida v. Royer*, 460 U.S. 491 (1983), the same standard — applied to a different set of circumstances — brought the Court to an opposite conclusion. There, the State argued that Royer's encounter with law enforcement personnel was entirely consensual. The plurality opinion of Justice White disagreed:

> "We find this submission untenable. Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, *while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.* These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.' *United States v.*

Mendenhall, 446 U.S. at 554 . . ." *Royer*, 460 U.S. at 501-02; emphasis added.

In examining the California Court of Appeal's application of *Royer* to the instant case, it bears emphasis that at no time did Royer ask the airport detectives if he was free to leave, nor did he make any attempt to leave. After his airline ticket and identification had been taken and the detectives requested that he accompany them to a room off the main concourse, "Royer said nothing in response but went with the officers as he had been asked to do." 460 U.S. at 494.

Although Deputy Gordon's seizing of Cholodenko's wallet and keys unquestionably mirrored the facts in *Royer*, the Court of Appeal reached a contrary result:

> "We do not agree that he was detained. The salient question is whether a reasonable person would have believed that he was or was not free to go. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 789.) Gordon testified he did not know whether he would have permitted Cholodenko to leave. The question did not *arise*. Cholodenko on his own initiative emptied his pockets, indicating a *cooperative spirit*. At least, there is the inference drawn by the trial court, from which we are not free to depart. Substantial evidence supports the trial court's conclusion that Cholodenko did not suffer a detention." A-6; emphasis added.[3]

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[3] It is respectfully submitted that the Court of Appeal failed to fully perform its appellate function by going no further than reviewing the trial court's *factual* determination under the substantial evidence test. The ultimate conclusion of the lawfulness of a seizure is a mixed question of law and fact which is reviewed *de novo*, even though factual findings are reviewed under the clearly erroneous standard. *United States v. $25,000 U.S. Currency*, ___ F.2d ___ (*No. 85-5854) (9th Cir. 1988); United States v. Mitchell*, 812 F.2d 1250, 1253 (9th Cir. 1987); *United States v. McConney*, 728 F.2d 1195 (9th

Paying merely lip service to the objective standard announced in *Mendenhall*, and as applied in *Royer*, the California Court of Appeal instead focused on Deputy Gordon's subjective state of mind. Starting with that faulty premise, the uncertainty of the officer was then held to obviate the objective circumstances such as petitioner having his keys, wallet and money withheld from him while the authorities proceeded to search the car. Absent from the Court of Appeal's discussion is any mention of the deputies' retention of petitioner's personal effects. A similar withholding of personal items in *Royer* was an important factor in the Court's determination that a reasonable person would not feel free to leave and that such action was an "official show of authority." *Royer*, 460 U.S. at 501-02.

Finally, the Court of Appeal insinuated that Cholodenko was not detained because his freedom to leave was a question which never arose. A-5-6. Apparently, the court would thus require that a person must test the waters, so to speak, to ascertain whether or not he is free to leave. However, as was made clear by Justice Stewart in *Mendenhall*, a person is not required to attempt to leave before he is considered "seized."

> Examples of circumstances that might indicate a seizure, *even where the person did not attempt to leave*, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the

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Cir. 1984) (en banc). Under California law, mixed questions of law and fact are also accorded *de novo* review. See *People v. Louis*, 42 Cal.3d 969, 984, 232 Cal.Rptr. 110, 728 P.2d 180 (1986), citing *People v. Leyba*, 29 Cal.3d 591, 174 Cal.Rptr. 867, 629 P.2d 961 (1981). Thus, under both the state and federal standard, the Court of Appeal was under an obligation to *independently review* the trial court's determination that petitioner was not detained. This the court plainly did not do.

use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554; emphasis added. See also dissenting opinion of Justice White at 570 n. 4.

Under the circumstances presented by this case, it seems indisputable that Cholodenko was seized, if not when he was frisked, at least at the time that control of his keys and other personal possessions was taken from him by Deputy Gordon with no indication petitioner was then free to leave — and every indication he was *not*. Both the trial court and the appellate court were wrong here, as a matter of law, in concluding that no detention occurred. Much as in *Royer*, where this Court examined whether its precedent (particularly *Mendenhall*) had been properly applied by the Florida Court of Appeal, it is respectfully urged that the petition for writ of certiorari be granted to consider whether the opinion of the California Court of Appeal correctly applied Fourth Amendment principles governing this issue as previously announced by this Court.

III

THIS COURT SHOULD EXAMINE THE RECURRING AND UNSETTLED QUESTION OF WHETHER PETITIONER'S INTENTIONAL ATTEMPT TO MISLEAD THE POLICE BY DENYING HE WAS DRIVING A CAR TOGETHER WITH HIS STATEMENT THAT THEY COULD SEARCH "WHATEVER YOU WANT WITH THOSE KEYS" CONSTITUTED COOPERATION WITH THE AUTHORITIES THAT RENDERED HIS CONSENT TO SEARCH A VOLUNTARY ACT WHEN UNBEKNOWNST TO HIM THE AUTHORITIES HAD ALREADY ESTABLISHED THE EXISTENCE OF THE CAR PARKED OUTSIDE

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court held that voluntariness of an individual's consent to search is to be determined from the totality of the circumstances. Representative of post-*Schneckloth* articulation of relevant factors is this recent listing by the Ninth Circuit Court of Appeals, as including

> "(1) whether defendant was in custody; (2) whether the arresting officers have their guns drawn; (3) whether Miranda warnings have been given; (4) whether the defendant was told he has a right not to consent; and (5) whether defendant was told a search warrant could be obtained. . . ." *United States v. Castillo*, ___ *F.2d* ___ *(No. 87-5042) (9th Cir. 1988).*

Other factors which may properly be considered include the circumstances of the arrest, whether the defendant resisted arrest or was handcuffed, the background of the consenter, and "whether the consenter has been, previously to giving of the consents, or for that matter even later, *evasive or un-co-operative* with law enforcement authorities. . ." *People v. Gonzalez*, 39

N.Y.2d 122, 128-30, 383 N.Y.S.2d 215, 219-21 (1976); see also *United States v. Lewis*, 274 F.Supp. 184, 187-88 (S.D.N.Y. 1967).

Of course, if Cholodenko was detained, as discussed in Part II, then his submission to authority did not result in consent. *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). As petitioner has consistently maintained, he *was* detained and such detention is a significant factor in determining the voluntariness of his consent. Nevertheless, even if Cholodenko was *not* illegally detained, his evasive conduct was an overriding factor militating against the California Court of Appeal's conclusion that he voluntarily consented to the search of the El Camino which Deputy Cortez had observed him to park at the scene.

One's purposeful misleading of the police as to the existence of a car is diametrically opposed to giving a voluntary consent to search the very vehicle claimed not to exist. In the leading case of *Castaneda v. Superior Court*, 59 Cal.2d 439, 30 Cal.Rptr. 1, 380 P.2d 641 (1963), the defendant — after being arrested — purposefully misled the police as to the location of his residence. 59 Cal.2d at 441-42. When his house was finally located, a warrantless search turned up a quantity of heroin. *Id.* at 442. In granting defendant's requested writ of prohibition to restrain trial on a narcotics charge, Justice Traynor writing for the California Supreme Court observed:

> "He [defendant] knew that the officers wished to search his home and that if they did so they would find evidence against him. He repeatedly attempted to lead the officers away from his home, and after these efforts failed, he was neither asked to nor did he express his consent that the search continue. These efforts make abundantly clear that petitioner did not freely and voluntarily consent to the search of his home. The most that can be inferred is that petitioner sought to placate the officers and hoped

> that by agreeing to the search of other premises, he would forestall the search of his home and the discovery of incriminating evidence. We do not condone petitioner's efforts to mislead the officer. It bears emphasis, however, that petitioner was under no duty to assist the officers in securing evidence against him." *Id.* at 443.

To the same effect is *People v. Faris*, 63 Cal.2d 541, 545, 47 Cal.Rptr. 370, 407 P.2d 282 (1965) (defendant's "attempt to mislead the officers with a false address clearly demonstrates that he did not consent to a search of the South Ellendale Street apartment").

New York's treatment of the problem is in accord. In *People v. Gonzalez, supra*, 39 N.Y.2d 122, the New York Court of Appeals explained:

> ". . . Mr. Gonzalez had previously forcibly resisted arrest by the Federal agents, one of whom had his weapon drawn. Mrs. Gonzalez, too, did not open the apartment door immediately upon request, she delayed approximately six minutes. She then opened the door only when the banging and kicking at the door indicated that the agents would enter in any event. If Mrs. Gonzalez had been trying to dispose of contraband, it was now obvious, she was not to be left free to complete the task. Such determined resistance and evasion is hardly compatible with a suddenly voluntary consent, which consent in all likelihood would be recognized as self-destructive. Instead, the circumstances are evidence that the consents were a yielding of overbearing official pressure." *Id.* at 130.

Several other courts have found active resistance or evasion, followed by recapitulation, not to have been the product of free will or a voluntary consent to search. See *Nowlin v. State*, 68 S.W.2d 496, 498 (Tex.Ct.Crim.App. 1934) ("No force can be given appellant's reply as embracing consent to the search where he immediately sought to avoid it by attempting to drive away when the

officer was in the act of beginning the search."); *Application of Tomich*, 221 F.Supp. 500, 503 (D. Mont. 1963), affirmed *Montana v. Tomich*, 332 F.2d 987 (9th Cir. 1964) ("At all times when he was allegedly consenting to the search he had in his possession, hidden in his shoe, the key to the trunk. If he truly consented to the search, he would have delivered up the key to the officers and saved them all the trouble they went to to get into the trunk of the car."); *Cipres v. United States*, 343 F.2d 95, 98 (9th Cir. 1965), cert. denied 385 U.S. 826 (Statement that bags were locked and key unavailable "on its face would have rendered the consent ineffectual").

More recently, in *United States v. Melendez-Gonzalez*, 727 F.2d 407 (5th Cir. 1984), the Fifth Circuit Court of Appeals examined the voluntariness of a consent to search where the defendant disclaimed *ownership* of the vehicle and possession of a key to open the trunk, yet claimed a possessory interest therein by virtue of having borrowed the car from a friend. *Id.* at 414. The *Melendez-Gonzalez* court held that ". . . the vague conversation carried on between the defendant and the agents . . ." did not satisfy the government's burden of removing the taint of the initial illegal stop. *Id.* at 414-15. Consequently, no consent was given for the prying open of the car's trunk. *Id.* at 415. As Professor LaFave discerns from the *Melendez-Gonzalez* case, "[a] disclaimer of ownership by one with a possessory interest may not be taken as consent." 3 W. LaFave, Search and Seizure §8.2 (f) at 201 n. 42 (1987).

These principles received an odd reception in the case at hand. In rejecting petitioner's assertion that he did not voluntarily consent to a search of the automobile, the California Court of Appeal stated:

> "Cholodenko points to three factors supporting his claim of coercion. First, that he was in detention when he supposedly consented. However, we have concluded that he was not detained. Second, that

Gordon badgered him by repeated requests for permission to search. However, there is no law against nagging. We find no authority limiting the number of times a police request may be repeated. It would be an ill-conceived innovation.

"Cholodenko's third and most substantive point is that his lying about having no car, i.e., his attempt to deceive the police, indicates that his eventual consent to search was given under duress. The theory is that a voluntarily consenting person would immediately tell the truth. Consent given in such circumstances has in the past aroused judicial suspicion. (*Castaneda v. Superior Court* (1963) 59 Cal.2d 439, 443; *People v. Faris* (1965) 63 Cal.2d 541,545.) However, there is no per se rule condemning consents obtained in this manner. It is a fact to put on the table when evaluating the totality of the circumstances. (*People v. Ibarra* (1980) 114 Cal.App.3d 60, 65.)

"The trial court concluded that Cholodenko 'for all intents and purposes was cooperating with the officer.' Substantial evidence supports this conclusion." A-6-7.

To begin with — as explained earlier — the Court of Appeal was wrong as a matter of law in concluding that petitioner was *not* detained. See Part II, *ante*. However, even assuming he was not detained, the trial court's determination that Cholodenko was cooperating is simply not supported by substantial evidence. As the Court of Appeal noted in setting forth the facts, after petitioner *twice* denied he had a car present, and after Deputy Gordon *knew* he was lying, the officer nevertheless persisted: " 'I asked him if he'd — if I could search any car on the street that these keys operated.' Cholodenko replied: 'You can search whatever you want with those keys. I don't have a car out there.' [¶i] *Gordon considered that he had obtained Cholodenko's consent to search.*" A-4; emphasis added.

Petitioner did what he could under the circumstances to mislead the authorities by repeatedly denying that he had driven to the location in an automobile. Unlike in *Tomich, supra*, 221 F.Supp. at 503, he could not also deny the existence of the keys. There is no dispute that petitioner did *not* know at that time that Gordon had already ascertained he did have a car present. In any event, "[t]he crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officer to suppose that he did." *Cipres v. United States, supra*, 343 F.2d at 98.

As in the cases cited above, Cholodenko's deliberate attempt to mislead the police is overwhelming evidence that he did not intend to voluntarily consent to a search of his vehicle. The trial court's determination that he was cooperating is not supported by the record or by common sense. At all times, petitioner was attempting to throw the police off track of the contraband in the El Camino parked outside that he obviously knew was within easy reach of the sheriffs at the scene; any other conclusion strains credulity.

The importance of a suspected person's calculated and intentional attempt to mislead the police as to the existence of an object he knows the authorities wish to search, in examining the totality of the circumstances surrounding a purported consent to search has received scant attention. Those few cases which do exist, and are cited hereinabove, all find that under comparable circumstances the defendant's "consent" was *not* the result of a voluntary act. Cholodenko's clear attempt to mislead and evade detection of his automobile and to shield it from being searched, coupled with his "consent" to search that which he stubbornly claimed not to exist, present compelling grounds for holding his consent was involuntary. This Court's examination of this recurring issue on which it heretofore has not spoken is long overdue. Petitioner respectfully believes a writ of

certiorari should be granted on this further question as well.

CONCLUSION

The California Court of Appeal's decision is a clear departure from the spirit — if not the letter — of settled Fourth Amendment law. The decision establishes, for this petitioner, an unjustified and overbroad bright-line rule that a search warrant issued as part of a narcotics investigation justifies a weapons search of *all* visitors to a residence while that warrant is being executed, simply because narcotics are asserted to be involved, on the basis of mere presence at the scene and without any nexus to criminal activity. At the same time, misapplying this Court's past treatment of issues of consent, the opinion ignores common sense and turns a dirge of denial into a song of assent. Petitioner respectfully prays for the

issuance of a writ of certiorari to address these important questions presented by this case.

DATED: May 20, 1988

Respectfully submitted,

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On the Petition

APPENDIX A

APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA	)	B 023944
	)	(Super.Ct.No. A 756045)
Plaintiff and Respondent,	)	
v.	)	
PAUL CHOLODENKO	)	
Defendant and Appellant.	)	

COURT OF APPEAL - SECOND DIST.
FILED
DEC 7 - 1987
ROBERT L. WILSON Clerk
Deputy Clerk

Paul Cholodenko appeals from his conviction of possession of more than 28.5 grams of cocaine for sale. (Pen. Code, §§11351, 1203.04, subd. (b)(1).) He pleaded guilty after his motion to suppress evidence was denied. (Pen. Code, §1538.5.) The issue on appeal is whether the evidence against him was seized in conformity with the Fourth Amendment.

Viewing the evidence most favorably to the judgment, on August 6, 1985, Sheriff's Deputies Gordon, Taylor, Cortez, and others were investigating drug dealing at 11910 Mayfield Avenue. They seized a quantity of

cocaine and arrested two persons, who were detained in a car near the apartment building with Officer Cortez.

Gordon knocked at apartment 101. Karolin Alexander opened the door. Gordon announced that he had a search warrant to execute. Taylor watched Alexander and a second occupant while Gordon searched the apartment. He found cocaine in the bedroom.

As Gordon left the bedroom Cholodenko walked into the apartment. As he was striding past Gordon towards the two women, Gordon stopped him and asked him who he was, identifying himself and stating that he was conducting a narcotics investigation. Cholodenko replied that he had come to visit his girlfriend.

At trial Gordon explained why he thought Cholodenko may have been connected with the apartment or the cocaine found in it: "Well, he didn't knock. He didn't appear to be a visitor. He — appeared to have some sort of business there. He was interested in what I was doing. He was demanding to now [sic] why I was there. And he appeared to me to be just a little more than just a concerned citizen. And it was my feeling that he had some involvement or business there. . . . He decided to come in and be in the middle of it. He's being pushy. He leads me to believe that he had some dominion there. He's paying the rent." This impression, coupled with the knowledge that drug dealers are very often armed, caused Gordon to pat down Cholodenko.[1]

Cholodenko apparently felt insulted by the pat down, because he said, "You don't have to do all that. Here. Look." He then emptied the contents of his pockets onto the table. This included alomost two thousand dollars in small bills and a car key marked "General Motors."

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[1] Gordon also admitted, "I'm saying I patdown everyone I come in contact in a house when I have a search warrant for my own safety."

Gordon testified on cross-examination that he did not know if Cholodenko was free to go at that point, because Cholodenko did not ask or try to leave.

Gordon informed Cholodenko of his constitutional rights, which Cholodenko waived. Gordon asked Cholodenko if he could search Cholodenko's car. Cholodenko denied that he had a car, claiming that he'd been dropped off by a friend. Stepping out of earshot, Gordon contacted by radio Taylor, who was still with the two arrestees in the car across from the apartment complex. Taylor told Gordon that a man matching Cholodenko's description had recently driven to the apartment complex and walked in. Consequently, Gordon knew that Cholodenko was lying.

Gordon returned to Cholodenko and picked up the keys. He again asked for permission to search Cholodenko's car. Cholodenko persisted in his denial. Gordon then tried a new approach: "I asked him if he'd — if I could search any car on the street that these keys operated." Cholodenko replied: "You can search whatever you want with those keys. I don't have a car out there."

Gordon considered that he had obtained Cholodenko's consent to search. He found in the car a loaded gun in a briefcase, and approximately a kilogram of cocaine. Cholodenko was arrested.

Cholodenko attacks the police officers' conduct at every point. First, he suggests that the pat-down search was not justified, because he was wearing pants and a shirt. We infer that Cholodenko means that no weapons could have been concealed on his person. It is a dubious proposition. Moreover, it is a factual question implicitly resolved against him at the trial level; it cannot be reconsidered here.

Officer Gordon testified that when he executes a search warrant he has a practice of searching everyone he encounters for his own safety. That would be good news for Cholodenko if Gordon had not had a reasonable suspicion that Cholodenko was armed. (*Terry v. Ohio* (1968) 392 U.S. 1, 27.) But the officers had already found illicit drugs in the apartment. Experience teaches that people connected with cocaine are very often armed. Finally, Cholodenko had indicated by his assured entry and purposeful attitude that "he had some involvement or business there." If he had business in that apartment, it could be related to the cocaine; if so, he could be armed. This reasoning, supported by the evidence, amply justified the pat down.

Next, Cholodenko asserts that the detention following the pat down was unjustified. We do not agree that he was detained. The salient question is whether a reasonable person would have believed that he was or was not free to go. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 789.) Gordon testified he did not know whether he would have permitted Cholodenko to leave. The question did not arise. Cholodenko on his own initiative emptied his pockets, indicating a cooperative spirit. At least, that is the inference drawn by the trial court, from which we are not free to depart. Substantial evidence supports the trial court's conclusion that Cholodenko did not suffer a detention.

Finally, the crucial question is whether Cholodenko truly consented to the search of his car. The voluntariness of a consent is determined from the totality of the surrounding circumstances. (*People v. Gee* (1982) 130 Cal.App.3d 174, 182.)

Cholodenko points to three factors supporting his claim of coercion. First, that he was in detention when he supposedly consented. However, we have concluded that

he was not detained. Second, that Gordon badgered him by repeated requests for permission to search. However, there is no law against nagging. We find no authority limiting the number of times a police request may be repeated. It would be an ill-conceived innovation.

Cholodenko's third and most substantive point is that his lying about having no car, i.e., his attempt to deceive the police, indicates that his eventual consent to search was given under duress. The theory is that a voluntarily consenting person would immediately tell the truth. Consent given in such circumstances has in the past aroused judicial suspicion. (*Castaneda v. Superior Court* (1963) 59 Cal.2d 439, 443; *People v. Faris* (1965) 63 Cal.2d 541, 545.) However, there is no per se rule condemning consents obtained in this manner. It is a fact to put on the table when evaluating the totality of the circumstances. (*People v. Ibarra* (1980) 114 Cal.App.3d 60, 65.)

The trial court concluded that Cholodenko "for all intents and purposes was cooperating with the officer." Substantial evidence supports this conclusion.

The judgment is affirmed.
NOT FOR PUBLICATION

ROTH, P.J.

We concur:

GATES, J.

FUKUTO, J.

APPENDIX B

SUPREME COURT
FILED
MAR 24 1988
Laurence P. Gill, Clerk
DEPUTY

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY
THE COURT OF APPEAL

2nd District, Division 2, No. B023944
S003854

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

PAUL CHOLONDENKO

Appellant's petition for review DENIED.

LUCAS

Chief Justice

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on May 20, 1988, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

Los Angeles District
Attorney's Office
18000 Criminal Courts Bldg.
210 West Temple St.
Los Angeles, CA 90012

Clerk, Supreme Court
California Supreme Court
3580 Wilshire Blvd.
Room 213
Los Angeles, CA 90010

The Solicitor General
of the United States
Department of Justice
Washington, D.C. 20530

Clerk, Superior Court
For: Hon. Kathleen Parker
111 North Hill Street
Los Angeles, CA 90012

Attorney General's Office
3580 Wilshire Blvd.
Room 800
Los Angeles, CA 90010

Clerk, Court of Appeals
California Court of Appeals
Second Appellate District
Division Two
3580 Wilshire Blvd.
Room 301
Los Angeles, CA 90010

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 20, 1988, at Los Angeles, California.

Claude A. Lagardere
(Original signed)